**JOGINDER KAUR GURDIAL SINGH & ANOR.**

**v.**

**SOHAN SINGH GHANIA SINGH & ANOR.**

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (MALAYA)
ABDUL HAMID OMAR FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 20 OF 1983]
13 APRIL 1984

***CONTRACT:*** *Loan made by moneylender - Title deed given as collateral - Memorandum of transfer stamped after execution - Whether duly stamped - Whether s. 27(1) of Moneylenders Ordinance 1951 was contravened.*

In this case the appellants who are co-administratix and co-administrator of the estate of one Gurdial Singh s/o Cherah Singh (deceased) brought an action in the High Court for a declaration that the estate of the deceased is the beneficial owner of a piece of land held under CT 16801 Lot 2889 situated in the Mukim of Bukit Raja, District of Kelang, Selangor, the title deed of which was deposited with the 1st respondent as collateral security for 2 loans of RM23,000 and RM15,000 respectively. The deceased in turn executed 2 promissory notes in favour of the 1st respondent. When the deceased could not repay the loans, the said land was transferred to the 1st respondent by the deceased for a further consideration of the sum total of the unpaid loans together with interest accrued and a payment of RM10,000. The appellants lodged a caveat on the said land. The 1st respondent then brought the appellants to see a lawyer with regard to the caveat. The appellants signed a document stating that the said land was "duly and lawfully" transferred to the 2nd respondent with full consideration having been paid and disclaiming any legal right to the land. The 1st respondent then paid RM3,000 to the 2nd appellant. However, the appellants refused to withdraw the caveat. The appellants then brought an action in the High Court for a declaration that the estate of the deceased is the beneficial owner of the said land, which was dismissed by the High Court. The appellants appealed on the ground that:

i) the trial Judge misdirected himself when he made wrong inferences by accepting as true the consideration for the said land as RM10,000 as stated on the transfer form and the said sum must have been meant for the cash payment of RM10,000 paid on the date of transfer;

ii) the memorandum of transfer was not duly stamped under the Stamp Ordinance 1949;

iii) there was a breach of s. 27(1) of the Moneylenders Ordinance 1951.

**Held:**

**[1]** What the trial Judge said in his judgment should not be construed in isolation in order to understand what he actually meant. From the evidence and facts before the trial Judge it was proper for the Judge to arrive at the conclusion.

**[2]** The memorandum of transfer of the title deed although stamped after execution, was validly stamped under item 32(a) of the First Schedule of the said Ordinance and under s. 47 of the Ordinance a penalty was duly charged for unstamped or insufficiently stamped document.

**[3]** From the facts and evidence of the case, the trial Judge was right in concluding that there was no contravention of s. 27(1) of the Moneylenders Ordinance.

*[Appeal dismissed with costs.]*

**Cases referred to:**
*Navaratnam v. Suppiah Chettiar [1973] 1 MLJ 173*
*Menaka v. Lum Kum Chum [1977] 1 MLJ 91*

**Legislation referred to:**
Contracts Act 1950, s. 66
Evidence Act 1950, s. 114
National Land CodeAct 56/1965, s. 301(e), 340(2)(b)
Moneylenders Ordinance 1951, s. 27(1)(2)
Stamp Ordinance 1949, ss. 12A, 36, 37(3), 41, 47(1)(ii), 52(1) item 32(a) 1st Sch.

**Other source referred to:**
*Ameer Ali & Woodroffe on Law of Evidence*, 14th Edn. p. 2704

*For the appellants - Gopal Davidason (M.S. Moorthy with him)*
*For the respondents - Dato Morris Edgar*

**JUDGMENT**

**Syed Agil Barakbah FJ:**

This case is rather unusual in the sense that the two appellants who are mother and son as the plaintiffs in the Court below and in their capacity as co-administratrix and co-administrator of the estate of one Gurdial Singh s/o Cherah Singh (deceased) their husband and father respectively, gave contradictory versions on material points in their testimonies before Peh Swee Chin J in the High Court, Kuala Lumpur, relating to their claim against the respondents/ defendants. They claimed *inter alia* for a declaration that the estate of the deceased is the beneficial owner of a piece of land held under C.T. 16801 Lot 2889 situated in the Mukim of Bukit Raja in the District of Kelang in the State of Selangor (the said land). Their main allegation was fraud on the part of the respondents as particularised at para. 7 of the statement of claim with 13 allegations.

The learned Judge in a careful and detailed judgment dismissed their claim with costs. Being dissatisfied with the said judgment they have now appealed to this Court. The memorandum of appeal contains 10 grounds. However, the appellants' Counsel abandoned all including the allegation of fraud except for grounds 4 and 5 which were argued before us. Since the trial Judge in his judgment dealt with the facts including the material issues in detail we propose to touch on the evidence pertinent to the two grounds of appeal.

The deceased in his life time was a licensed moneylender and the registered owner of the said land. The first respondent was also a licensed moneylender whose business appeared to be more prosperous than that of the deceased. It was an undisputed fact that prior to his death the deceased borrowed money from the first respondent and executed two promissory notes in his favour. Nothing was known about the transactions until after his death when according to the son on 6 February 1972 he discovered two pro-notes, the first bearing the date 6 January 1969 and the second 15 January 1970 for two loans of RM23,000 and RM15,000 respectively. On each of the said pro-notes appeared an endorsement signed by the deceased to the effect that the document of title of the said land was deposited with the first respondent

as collateral security. The unexpected event caught both the mother and the son by surprise. As a result of the son consulting his solicitors two letters were sent to the first and second respondents asking for particulars of the loan and for inspection of the document of title. No replies were received. The son then lodged a caveat on the said land. According to him the first respondent came to their house and threatened the mother and the daughter with harm if they interfered with the transfer of the said land. The first respondent came again on 21 July 1972 fetching the son and the mother to the office of a lawyer. There the lawyer read and explained to them the contents of a document after which they acknowledged that they understood them and thereafter put their signatures on the said document. It was a letter confirming and acknowledging that the said land was "duly and lawfully" transferred to the second respondent with full consideration having been paid and disclaiming any legal right to the said land (p. 15 of the second Volume P2). The first respondent paid RM3,000 to the son less RM30 fee for the lawyer. The son however did not withdraw the caveat on the advice of his solicitors. He alleged that the first respondent threatened him again and because of that he lodged a police report. Subsequently the first respondent filed an application in the High Court, Kuala Lumpur, for the removal of the caveat but his application was dismissed.

The first respondent in his testimony confirmed the execution of the two pro-notes by the deceased who borrowed from him the sums of RM23,000 and RM15,000 respectively. On both occasions the pro-notes were signed at the office and in the presence of DW1 a Justice of the Peace. A copy of each of the pro-notes was handed to the deceased and the document of title to the said land was in turn handed by the deceased to the first respondent as collateral security. Thereafter the deceased failed to pay the interest on the loans. Later he requested the first respondent to purchase the said land for the sum of RM10,000 and including the full settlement of the two loans with interest which then remained totally unpaid. The first respondent agreed with the suggestion but gave the deceased one week to try and dispose of the said land himself. When the deceased failed to do so on 30 July 1970 both of them went to DW1's office, the first respondent taking along his daughter-in-law i.e., the second respondent and his son (DW6) and the deceased was accompanied by two witnesses Meha Singh and Gurdip Singh. According to the first respondent the agreed total consideration for the sale of the said land to him was RM53,314.90 consisting of the two loans and accrued interest thereon and the cash payment of RM10,000. In the presence of DW1 and the witnesses the first respondent handed RM10,000 the two pro-notes and a receipt for the loans and accrued interest to the deceased. Thereafter they proceeded to the Land Office where the transfer of the said land was attested by the then CLR (DW2). It was registered in the name of the second respondent on the same date.

The learned Judge did not accept the evidence of the appellants and PW7. Of the appellants he remarked:

> Their evidence reveals a most remarkable state of affairs in that the first plaintiff (hereinafter called "the said mother") and the second plaintiff (hereinafter called "the said son") gave diametrically different evidence on some material points tending to contradict each other and in this connection the said mother's evidence would appear to bear out the evidence of the defendants on these material points.

Among the material contradictions noted by the trial Judge were that the son in his evidence stuck to para. 4 of the statement of claim by saying that the two loans advanced by the first respondent to the deceased were RM5,000 and RM3,000 respectively. The mother on the other hand testified rather in support of the respondents' evidence that the two loans were RM23,000 and RM15,000 respectively but advanced in various small sums. Further the son

alleged that the mother had demanded all the property of the deceased in India before she would give evidence in favour of the estate in this case. He was supported by his sister who, to use the words of the learned Judge "displayed a hatred of her own mother ... so much so that she could not help attacking her mother's moral character." Conversely the mother alleged that all her children were against her siding with the son. She denied having demanded for herself the property of the deceased in India and alleged that the son had tried to stop her from returning to Malaysia by taking her passport.

That was the state of affairs between the two plaintiffs in the Court below as observed by Peh Swee Chin J. In our view the antagonism between the son and daughter on the one side and the mother on the other for reasons known only to themselves led to the contradictory versions being given on very material points which in the circumstances resulted in their claims against the respondents falling into pieces in so far as factual evidence is concerned. The Judge concluded that the mother was unreliable but the son was more unreliable. According to him the mother being a widow and a woman of no private means had a lot to lose in her beneficial interest to one-third undivided share of the said land if they failed to succeed in this case. Secondly if her demand for all the deceased's property in India be given to her as a condition for giving favourable evidence was true, then her evidence would be rendered unreliable. Of the son he observed that not only had he disowned for all practical purpose the acknowledgment which he had signed in the presence of the lawyer, the contents of which he had fully understood and having raised no slightest objection thereto, but he also admitted in Court of having used a false school certificate to apply for a job. In other words, his credibility as a witness was at stake. With regard to the daughter the learned Judge found that she had signed her father's name in one of the rent receipts which she issued to the tenant of the house standing on the said land for the purpose of boosting the son's claim that the tenant had paid rents to the deceased prior to his death.

On the other hand he accepted the evidence of the respondents as corroborated by their witnesses as probable and true. Apart from giving oral evidence the respondents also produced numerous documents in support of their case viz. a bundle of assessment bills and receipts, three books of rent receipts, deposit receipts for water charges, receipts for refuse collection and conservancy, a copy of an application for repair of the houses standing on the said land and letter of approval from the Majlis Bandaran Kelang, moneylender's licences issued in the first respondent's name and carbon copy of receipt issued to the deceased for RM53,314.90 stated to be "full settlement of loans and interest in connection with sale of land." These are questions of fact and credibility of which the Judge having seen and heard the witnesses made his observations and reached his conclusions rightly and properly. We have no grounds to interfere.

We now have a clear picture of the material facts and surrounding circumstances of the case relevant to the appeal and proceed to consider ground 4. It alleges that the learned Judge misdirected himself when he made wrong inferences by accepting as true the consideration for the said land was stated to be RM10,000 on the transfer form and the said sum must have been meant for the cash payment of RM10,000 paid on the date of transfer. We find this ground to be without merit whatever. What the Judge said in his judgment should not be construed in isolation in order to appreciate what he actually meant.

In his findings he accepted that the deceased executed the two pro-notes, took loans of RM23,000 and RM15,000 respectively from the first respondent and that the monies were handed in the presence of DW1 whose forgetfulness in relating the events was quite natural since they happened about 10 years prior to the trial. He rejected the evidence of the appellants and their witnesses that the loans were RM5,000 and RM3,000 respectively. He

further concluded that the transfer of the said land was executed legally for the total consideration of the sum total of the unpaid loans together with unpaid interest thereon up to the date of the said transfer plus a further cash payment of RM10,000. Since the transfer form of the said land clearly stated the sum of RM10,000 as consideration and there being ample evidence as corroborated by witnesses that cash for the said sum was paid to the deceased in DW1's office on the date of transfer, it is proper for the Judge to arrive at such conclusion. In our view there is no misdirection.

The Judge accepted the first respondent's explanation that he was not aware that the loans advanced earlier had to be included in the transfer form together with the RM10,000 cash paid on the day of transfer as consideration. The loans took place some time previously in separate business transactions and thereafter "being wiped out and redeemed" (see para. 4 of the statement of defence) it was only natural for him to have misunderstood the real significance of having to state the total sum of RM53,314.90 as the actual consideration. Any way in the light of the subsequent endorsement in the transfer form for the purpose of the payment of stamp duties on the actual sum (see p. 359 of Record) and the issue of the receipt to the deceased for the full settlement of the loans and interest thereon (see p. 358 of Record), a carbon copy of which was produced in Court, there should be no reason for doubt of the genuine mistake on the part of the first respondent in stating the consideration as RM10,000 in the transfer form instead of RM53,314.90. There should therefore be no substance in the allegation that the respondents' intention was to evade stamp duty.

There is a further allegation arising from the above that the memorandum of transfer was not duly stamped under the Stamp Ordinance, 1949 (No. 59 of 1949). It was submitted that although a penalty amounting to RM1,736 was paid and the *ad valorem* stamp duty based on the actual consideration was stated as RM534, it was done 4 years later on 14 June 1974 and not on the execution of the said memorandum and by that time the market value of the said land had substantially appreciated.

It should be observed that the memorandum of transfer of the said land executed in Form 14A of the National Land Code, bears a certificate of the Collector that he assessed the duty under s. 36 of the Stamp Ordinance amounting to RM534 in accordance with item 32 (a) of the First Schedule to the said Ordinance. Under sub-section (1) he is empowered to make such assessment on "any instrument whether executed or not or whether previously stamped or not" which is brought to his notice for the purpose of assessing the proper duty chargeable. For the purpose of assessing the value of any property which is the subject of a transfer, the Collector is required to take into consideration under s. 12A:

(a) the money value, if any mentioned in the instrument of transfer as the consideration for the transfer or settlement; or

(b) the market value, as on the date of execution of the property transferred or settled, whichever is the greater:

Provided the officer before whom the instrument of transfer is tendered for registration may accept the consideration mentioned therein as being the market value, unless he shall have reason to believe otherwise.

It is clear in this case that the Collector exercised his discretion under the proviso by accepting the sum of RM53,314.90 as the market value of the said land indicating thereby that he did not believe it to be otherwise and assessed RM534 as stamp duty chargeable for the memorandum of transfer. By virtue of sub-section (3) of s. 37 the endorsement by the Collector under s. 36 shall be deemed to be duly stamped, be receivable in evidence and may be acted upon and registered as if it had been originally duly stamped.

The Collector also charged a penalty of RM1,736 under s. 47 of the Ordinance. (See p. 359 of Record at top right-hand portion). He is empowered to do so under sub-section (1)(ii) of the said section. Except for a bill of exchange, cheque or promissory note and other instruments mentioned in sub-section (1)(a), (b) and (c) which must be stamped before or at the time of execution as required by s. 41 (see *Navaratnam v. Suppiah Chettiar* [1973] 1 MLJ 173, 174 2nd column para. I) other instruments whether unstamped or insufficiently stamped, may be stamped after the execution thereof on payment of the unpaid duty and a penalty of twenty five dollars or four times the amount of the deficient duty, whichever sum is the greater. The effect of such compliance rendered the memorandum of transfer of the said land to be admissible in evidence and to be acted upon registered or authenticated by any public officer by virtue of s. 52(1) of the Ordinance.

For the reasons stated above we conclude that the memorandum of transfer was duly stamped under the Ordinance. Contrary to the appellants' contention we hold that the issues whether it is an instrument unfit for registration under s. 301(e) of the National Land Code and whether the title or interest of the said land registered in the name of the second respondent is defeasible under sub-section 2(b) of s. 340 of the Code have not arisen at all.

The allegation relating to the second respondent's failure to mention the sale of the said land in her affidavit supporting an earlier motion filed for the removal of the caveat is in our view irrelevant (see O.M. 77 of 1972 on p. 182 of Record). It was sufficient for her to state that she was the registered owner of the said land and that the appellants having acknowledged her as such had failed or neglected to remove the said caveat. (See p. 182 of Record). The affidavits filed by the appellants (respondents therein) mentioned the sale and alleged fraud similar to para. 9 of the statement of claim. The motion was heard on 21 February 1974 by Hashim Yeop Sani J (as he then was) and dismissed with an order that the appellants file a civil action within 6 weeks from the date of the said order. (See p. 205 of Record). Hence the present action under appeal was duly filed.

Ground 5 alleges that the learned Judge erred in law and in fact in concluding that there was no breach of any of the provisions of the Moneylenders Ordinance.

Having regard to the statement of claim we do not think that this issue is by itself properly pleaded. In the first place it was pleaded under the particulars of fraud at sub-paragraph (g) of para. 7. This ground of fraud was abandoned by the appellants' Counsel. In the second place although para. 9 alleges the circumvention of the Moneylenders Ordinance it is directed towards the purported transfer of the said land by the deceased as being a sham, illusory and fraudulently engineered by the second respondent for his own benefit. Here again it relates to the abandoned ground of fraud. Be that as it may, since the trial Judge had taken it into consideration and the matter was also argued before us we propose to consider it.

The findings of the learned Judge in his judgment were that no fraud of the kind as particularised in the statement of claim or any breach of any provision of the Moneylenders Ordinance had been established to his satisfaction. We are concerned only with the second limb. Primarily his finding on the issue was based purely on facts the material aspects of which have been dealt with earlier in ground 4.

The appellants' argument was focussed on the admission by DW1 who attested the 2 pro-notes (Exh. D26A and D26B) to the effect that no money was passed by the first respondent to the deceased in his presence at the material time and on his remark that there was no necessity for the money to be so paid in his presence, so long as he was satisfied from inquiry that the deceased had admitted having received the same. If that was so, we would

agree that there might be contravention of s. 27(1) of the Moneylenders Ordinance, 1951 which requires *inter alia* that the money borrowed shall be paid over by the lender to the borrower in the presence of the attestor who shall certify the fact upon the promissory note. Sub-section (2) thereof provides that any promissory note not so attested as required shall be void and the lender is not entitled to recover any loan for which such note is taken as security. In short a breach of such provision will render the contract unenforceable to the detriment of the lender. (See *Menaka v. Lum Kum Chum* [1977] 1 MLJ 91). The learned Judge however had taken DW1's evidence into consideration and concluded that since the transactions had taken place some 10 years prior to the proceeding it was probable in the circumstances for DW1 to have forgotten the particular transactions. Having perused the record we are satisfied that the Judge's conclusion with regard to DW1's forgetfulness was not without foundation. We note that even in the case of the payment of RM10,000 in relation to the transfer of the said land, DW1 was hesitant at first in examination-in-chief but subsequently said the sum was paid on the day of the transaction. However in cross-examination he changed his mind and said he could not remember when the sum of RM10,000 was paid. That was contrary to what he had stated at paragraph 1 of his affidavit filed in support of the first appellant in O.M. 77/1972. (See p. 195 of Record). Apart from that he admitted having attested numerous promissory notes and other documents in the course of those years. Both the deceased and the first respondent whom he knew had come to see him on a number of occasions for similar purpose. Apart from attesting documents, DW1 who was 73 years old, also carried on his own business of a land valuer and an insurer. In that respect he had to deal with matters connected thereto and met people in relation to his business. In the circumstances it would be most difficult, if not impossible, for him to remember in exact detail what had actually transpired before him some 10 years previously. For a man of his age it would be indeed remarkable if he could remember considering the frailty and retention of memory as noted by the Judge, and in the absence of any proper record being kept except for what has been written on the pro-note itself. Indeed for that matter, the Judge's conclusion is borne out by DW1's certificate on the two pro-notes which also contain his (DW1's) signature and official stamp. The certificate states *inter alia*:

> I Lee Eng Teh, Justice of the Peace, Selangor of Kelang ... hereby testify that the signature of the borrower to the above promissory note was written in my presence on this 6th day of January 1969 the same having been read over, translated and explained to the Borrower who appeared to understand the meaning of the same and **that the sum of RM23,000 above named was paid over by the Lender to the Borrower in my presence.**
>
> Signed and
> official Stamp.

(Emphasis supplied). (See pp. 358 and 400 of Record). Clearly the above certificate was made in pursuance of s. 27 of the Moneylenders Ordinance.

In the light of the above we are of the view that the learned Judge having had an opportunity of seeing and hearing DW1 was in the best position to determine the question of credibility and the evidence after having observed his demeanour and considered his age and other material factors. We are satisfied that he had taken proper advantage of his position and had arrived at the right conclusion that the monies were handed by the first respondent to the deceased in DW1's presence.

We like to point out the facts and circumstances of the case in support of the above:

(1) The deceased was a licensed moneylender and during the 19 months after the loan transaction and prior to his death he did nothing to challenge the legality of the loans. The pro-notes discovered by his son in the house after his death well indicated that he had received them back from the first respondent whose evidence to the effect was supported by the receipt issued by him in that respect. This is also strengthened by the presumption under sub-section (c) of s. 114 of the Evidence Act, 1950. The Court will presume that when a document creating an obligation is in the hands of the obligator, the obligation has been discharged. There is a *prima facie* presumption when a bill of exchange or a pro-note is found in the possession of the maker that such note has been duly paid. (See *Ameer Ali & Woodroffe on Law of Evidence*, 14th Edn., p. 2704).

(2) The respondents in particular the second respondent who became the registered owner of the said land, have exercised all rights of ownership since the transfer until the death of the deceased and till the present day by paying the quit rents, assessments and other rates, repairing the houses thereon and collecting rents from the tenants as borne out by the various documents discussed earlier.

(3) The appellants in support thereof had duly acknowledged the sale of the said land as being lawfully transferred with full consideration having been paid and disclaiming any legal right thereto.

(4) It would seem that whatever knowledge the appellants had on the matter was derived from the discovery of the pro-notes by the son there being no evidence whatever that the deceased had made any complaint of any sort to either of them regarding the illegality of the pro-notes prior to his death. It was therefore not surprising that the son and the mother made material contradictions in their evidence as noted by the learned Judge, and which in our considered judgment is the manifestation of their lack of knowledge of what had actually transpired between the deceased in his life time and the first respondent pertaining to the loans and the land transactions.

We cannot accept the view that there was a breach of the Moneylenders Ordinance as contended by the appellants. It follows therefore the provisions of s. 66 of the Contracts Act, 1950 relating to the restoration of the property to the original position on the discovery of a void contract as dealt with in *Menaka v. Lum Kum Chum* (*supra*) do not arise. There cannot be *restitutio in integrum* in this case.

For the above reasons the appeal is dismissed with costs. The deposit by the appellants is to be paid to the respondents to account for costs.

Also found at [1984] 1 CLJ 342